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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 935

MILES LABORATORIES, INC., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, ETC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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OCTOBER TERM, 1943.

No. ....

MILES LABORATORIES, INC., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, a commission created by Act of Congress, and WILLIAM A. AYRES, GARLAND S. FERGUSON, EWIN L. DAVIS, CHARLES H. MARCH, and ROBERT E. FREER, individually and as members of the Federal Trade Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia affirming a judgment of the District Court of the United States for the District of Columbia, which dismissed petitioner's complaint brought under the Federal Declaratory Judgment Act.

OPINIONS BELOW.

The opinion of the District Court on motion to dismiss is reported in 50 F. Supp. 434 (R. 35). The opinion of the Court of Appeals is not yet reported. It will be found in the record at page 45.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 7, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (U. S. C., Title 28, Sec. 347 (a)).

STATUTES INVOLVED.

The statutes involved are the Federal Declaratory Judgment Act, and portions of the Federal Trade Commission Act and the Federal Food, Drug and Cosmetic Act. The pertinent provisions of these statutes are printed in the appendix to this petition. Rule 57 of the Federal Rules of Civil Procedure, likewise involved, is also printed in the appendix, together with the Advisory Committee notes on that Rule.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The record in this case contains a complaint for a declaratory judgment (R. 2), motion to dismiss the complaint (R. 34), opinion (R. 35) and judgment of the District Court dismissing the complaint for lack of jurisdiction of the subject matter (R. 42), opinion of the Court of Appeals (R. 45) and its judgment affirming the District Court (R. 49).

Petitioner is an Indiana corporation which manufactures and sells in interstate commerce certain proprietary remedies known as Dr. Miles' Nervine and Dr. Miles' Anti-Pain Pills. The remedies are designed to afford and do afford relief from pain and certain ner-

vous afflictions. The product Nervine contains sedative bromides. Anti-Pain Pills contain acetanilid, which relieves pain in the conditions specified in the labeling (R. 2, 3, 4, 5).

The labeling of these remedies (labeling includes everything appearing on the carton, container and by way of inserts), is under the jurisdiction of the Food and Drug Administration of the Federal Security Agency, acting under the Food, Drug and Cosmetic Act of 1938 (Appendix, page 22). The Act prescribes in minute detail the composition of the labeling, including ingredients, dosage, warnings and the like. The labeling used by petitioner for Nervine and Anti-Pain Pills complies with the Food, Drug and Cosmetic Act and the regulations of the Food and Drug Administration (R. 8). Samples of petitioner's labeling are reproduced in the record at pages 19-24. The labeling sets forth candidly the ingredients of the products, the disorders intended to be treated, the permissible dosage and cautions against overdosage.

Petitioner advertises Nervine and Anti-Pain Pills. The advertising does not set forth the dosage or cautions which appear in the labeling. Every advertisement, however, contains cautionary statements (R. 8), such as—

"Full Directions on Package—Read Them"

Or

"Read Full Directions on Bottle."

Advertising as such is not regulated. *False* advertising is prohibited by the Federal Trade Commission Act, Sec. 12, added by the Wheeler-Lea Act amendments of 1938 (Appendix, page 27). Sec. 12 makes the dissemination of a false advertisement an unfair

or deceptive act or practice in commerce within the meaning of Sec. 5 of the Federal Trade Commission Act. Sec. 15 (a) defines a false advertisement as an advertisement—

> "other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual."

The Federal Trade Commission investigated petitioner's business in Nervine and Anti-Pain Pills and sent it a stipulation (R. 28), charging that it was engaged in unfair or deceptive acts or practices in commerce in that neither petitioner's advertising nor its labeling contained warnings that *excessive* use of Nervine "may be dangerous, causing *mental derangement*" (R. 31) and that *excessive* use of Anti-Pain Pills "may be dangerous, causing *collapse* and/or *dependence upon the drug*" (R. 32). The stipulation, if signed, admitted the truth of these allegations and required petitioner to include these specific additional warnings in its advertising or its labeling. If it chose to include them in the labeling, it need not do so in advertising, other than to say—"Caution, Use Only as

Directed" (R. 32, 33), words already in effect included there (R. 8).

The stipulation makes no more than a passing reference to petitioner's advertising, without citing any specific examples, but sets forth the labeling in full (R. 30, 31) and bases its findings upon the contents of the labeling. The stipulation does not state, and respondents have never contended, that either the advertising or the labeling contains any *false* claims, or that the products advertised are injurious to health, when taken in the dosage and with the frequency recommended. The stipulation confines itself solely to the supposed consequences resulting from so-called *excessive* use.

The communications from the Federal Trade Commission which accompanied the proposed stipulation (R. 25, 26, 27, 28) threatened a proceeding against petitioner, of a kind not specified, if petitioner refused to sign the stipulation. Among the proceedings which the Commission might bring are, a complaint under Sec. 5 of the Federal Trade Commission Act; an injunction proceeding under Sec. 13 (a); or a criminal proceeding under Sec. 14, to be brought by the Attorney General upon certification by the Commission (Appendix, pages 24, 28, 29, 31). Respondents have not denied that it was their intention to proceed against petitioner upon its failure to sign the stipulation and respondents affirmatively stated in their brief in the court below that such a proceeding would be by way of a Sec. 5 complaint, looking to a cease and desist order by the Commission after the taking of testimony.

Petitioner refused to sign the stipulation and shortly thereafter filed its complaint in the District Court

for a declaratory judgment against the Federal Trade Commission and its members, individually and in their official capacity. The complaint alleged that respondents were acting outside the scope of their lawful authority in attempting to tamper with petitioner's labeling and that, as a matter of law, petitioner's advertising was not false or misleading and did not fall within the prohibitions of the Federal Trade Commission Act (R. 13, 14). The complaint pointed out, with respect to labeling, that the jurisdiction of the Food and Drug Administration was exclusive under the facts as set forth (R. 6, 9, 13). As to advertising, the complaint alleged that the warnings demanded (collapse, mental derangement, dependence on the drug) all related to excessive use and not to consequences which might result, as the statute provides, from the use of the products under conditions prescribed or under such conditions as are customary or usual (R. 12, 13, 14). The complaint recited the threats made by the Commission to proceed against petitioner and the great damage and injury to its business which would result now and thereafter (R. 15, 16). The prayers of the complaint sought a declaration of lack of power in the respondents to require what they demanded in the stipulation (R. 16, 17).

Respondents filed a motion to dismiss, which was granted and the complaint dismissed on the ground that the court lacked jurisdiction of the subject matter. The Court of Appeals affirmed, saying in an opinion by Chief Justice Groner (R. 47, 48):

> "Here, as we have seen, appellant's contention is that its advertisements are lawful and hence do

not offend the Act, and that its labels are matters not within the scope of the Act, as the result of which the Commission has no lawful right to issue its complaint in the one case or the other, and that accordingly it ought to be saved the expense and embarrassment of a long and useless Commission proceeding. The Commission denies, and we think correctly, that it is attempting to regulate appellant's labels. All that it said on that subject was to offer that means of correction as a choice which appellant could take or leave as it pleased. However desirable it may be thought that appellant, when challenged as to its methods of business, should have recourse to a court of equity to construe the extent of the Commission's power in a case in which it is made to appear that a public hearing will result in irreparable injury, nevertheless, it has been held so often as not to require citation of authority, that for a Federal Court to assume the right to suspend the Commission's investigation, while it determines controversial questions of law or fact, would be a clear assumption of power it does not possess. The administrative remedy which Congress has provided must be first exhausted. To hold otherwise, the Supreme Court has recently and explicitly said, (*Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50)

> '* * * would * * * in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance.'

That the Supreme Court will change or modify its views in this respect is an 'iridescent dream,' for the trend is decidedly the other way."

* * * * * * * *

"In the present case and on the present record—if the question were open—it might very well be argued that appellant's advertising is neither false nor misleading, when considered in the light of the statutory provision requiring no more than a revelation of all material consequences which may result from the use of the product in the customary way or under the conditions prescribed in the advertisement. But since the matter is not open, we have no occasion to examine or weigh questions of fact or law, since they are in the first instance within the exclusive jurisdiction of the Commission and its decision when made is subject to challenge only as provided in the Act; nor is there anything in the Declaratory Judgment Act which changes this result or creates new rights or increases or extends the jurisdiction of the courts. *Doehler Metal Furniture Co.* v. *Warren,* 76 U. S. App. D. C. 60, 129 F. (2d) 43, 45." (Italics supplied.)

QUESTIONS PRESENTED.

1. Does the fact that one of the parties to a justiciable controversy is a federal administrative agency deprive the District Court of jurisdiction to hear the controversy and give a declaration of rights under the Federal Declaratory Judgment Act?

This question has several aspects, namely:

(a) Does the Declaratory Judgment Act give a remedy in cases of actual controversy with ad-

ministrative bodies except in those cases which involve federal taxes?

(b) Does the history and time of enactment of the Declaratory Judgment Act, and particularly the amendment excluding federal tax claims, indicate the congressional intent to give the Act broader scope than the courts in this case have allowed?

(c) Is it of importance on the question of jurisdiction that the only issue in this case on the merits is one of law—the construction of the Federal Trade Commission Act and the Food, Drug and Cosmetic Act—and that there is no issue of fact presented by the complaint?

(d) What is the nature and extent of the so-called exclusive jurisdiction of the Federal Trade Commission?

2. Does the Federal Trade Commission have authority or jurisdiction to determine the legality or legal sufficiency of language employed by petitioner in the labeling of its products; or is that authority and jurisdiction lodged solely in the Food and Drug Administration?

3. Does the Commission have any authority or jurisdiction to require petitioner to include in its advertising statements of consequences alleged by the Commission as likely to result from the use of the products in quantities and in manner and under conditions *other* than those prescribed in the advertising or labeling and *other* than those which are customary or usual?

4. Has the Commission authority or jurisdiction to require warnings different from or in excess of those adopted by petitioner in conformity with the Food, Drug and Cosmetic Act?

5. Can the petitioner legally be charged with false advertising under the statute for not including in the advertisement additional cautions applying only to *excessive* use?

6. Is it not judicial and administrative economy to prevent the Commission from exceeding its statutory jurisdiction before the time, trouble and expense of an *ultra vires* proceeding is incurred?

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In affirming the District Court's dismissal of the complaint for want of jurisdiction of the subject matter.

2. In failing to hold that petitioner has a remedy under the Declaratory Judgment Act.

3. In failing to hold that, as a matter of law, respondents are seeking to exercise powers not conferred upon them by the Federal Trade Commission Act.

4. In holding that there is an exclusive administrative remedy which must be pursued before court review can be had.

5. In holding that this novel question, not before adjudicated, is foreclosed by prior rulings of this court.

REASONS FOR GRANTING THE WRIT.

I.

Confusion of the Declaratory Judgment Remedy with the Remedy by Injunction.

Petitioner's complaint presents all the elements of an "actual controversy" under the Declaratory Judgment Act. The complaint shows the invasion of a substantive right, the right to be free from unlawful interference with petitioner's business affairs. It presents a controversy between the parties and a threat by the Commission to proceed against petitioner in some unspecified manner, civil, criminal or administrative. In a suit between private parties, the motion to dismiss would undoubtedly have been overruled and the complaint upheld. *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227; *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Wallace*, 288 U. S. 249.

The Court below rested its decision primarily on the language of this Court in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, to the effect that a remedy by injunction is not available where the statute provides an administrative procedure which was not followed, although proceedings before the administrative body had started. The issue in the *Myers* case was the presence or absence of interstate commerce, a question of fact.

The Court of Appeals ignored the essential differences between this case and the *Myers* case:

1. In injunction proceedings the absence of another adequate remedy must be affirmatively shown, whereas a complaint for declaratory relief will lie whether or not there is another remedy (Federal Rule 57, Appendix, page 20).

2. Only a question of law—the construction of statutes—is here involved and courts are traditionally better equipped than administrative bodies to determine legal issues.

3. This case had not yet gotten into the channel of an administrative proceeding. There was a threat but no proceeding had been commenced. The possible statutory procedures which might have been adopted by the Commission included not only an administrative hearing and decision but also a possible civil or criminal suit in a District Court.

4. The so-called limited jurisdiction of the Circuit Courts of Appeal to review orders of the Commission only on appeal (Sec. 5 (d) Federal Trade Commission Act, Appendix page 26) refers to final orders and not to *ultra vires* charges and threats where there has been no order and no proceeding.

Under these circumstances it was error for the Court of Appeals to follow the *Myers* case blindly, while expressing doubt of the legality of the position taken by respondents on the merits of this case. Under the entirely different circumstances presented by the present case, the Court of Appeals assumed too much in saying that it is an "*iridescent dream*" to expect this Court to modify the views expressed in the *Myers* case. There is no necessity for modifying such views because they are inapplicable here. This Court should grant the writ in order to correct the error into which the Court below has fallen.

II.

The Plain Intent of Congress was to Apply the Declaratory Judgment Act to this Type of Proceeding.

The Federal Declaratory Judgment Act was signed June 14, 1934. It provided an additional remedy for litigants in the federal courts. There were no exceptions in the statute, so long as the procedural requirements were met. The limitations placed upon the Act in this case are grounded upon decisions like *Myers* v. *Bethlehem Shipbuilding Corp., supra,* rendered subsequent to the enactment of the statute. Congress had every reason to believe, in June 1934, that even the remedy by injunction was available (in the absence of another remedy) where an administrative officer or commission was exceeding his or its authority. *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Terrace* v. *Thompson,* 263 U. S. 197; *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365.* These cases are cited in the report of the Senate Judiciary Committee on the bill. (Senate Report No. 1005, 73rd Congress, 2nd Session). The report stated:

> "The fact is that the declaratory judgment has often proved so necessary that it has been employed under other names for years, and that in many cases the injunction procedure is abused in order to render what is in effect a declaratory judgment. * * * Much of the hostility to the extensive use of the injunction power by the Federal courts will be obviated by enabling the courts to render declaratory judgments."

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* And see also *Stark* v. *Wickard,* .... U. S. ...., 64 Sup. Ct. Rep. 559, February 28, 1944.

At the time the Act was passed, federal law prohibited injunctions in tax cases (R. S. 3224). There was at that time a special statutory procedure for the trial and review of such cases. Nevertheless, the Declaratory Judgment Act was amended August 30, 1935 (C. 289, 49 Stat. 1027) by inserting the words "except with respect to Federal taxes" in subdivision 1. The very fact of this single amendment—there have been no others—supports the argument that Congress did not intend to limit the Act in its application to other controversies between a citizen and a federal administrative agency. Such agencies, as plaintiffs, have time and again made use of the Act for their own purposes. *Federal Deposit Ins. Co.* v. *Records,* 34 F. Supp. 600; *Federal Deposit Ins. Co.* v. *Citizens State Bank,* 130 F. 2d 102; *United States* v. *Fuller,* 20 F. Supp. 839.

Granting that Congress did not intend to substitute the fact finding powers of a court for the fact finding powers of a commission, there is every evidence that it intended the declaratory procedure to be used and useful in determining the scope of the Commission's jurisdiction and its lawful powers. Any other conclusion ignores the state of the law at the time the Act was passed. The decision below amounts to judicial legislation and should be reviewed by this Court.

III.

The Decision of the Court of Appeals is Contrary to the Overwhelming Weight of Authority in Cases Arising under State Declaratory Judgment Acts.

Thirty-four states already had declaratory judgment acts when the federal statute was adopted. Other states have followed suit since that time. The well

established rule under state law is that a declaratory judgment may be granted to settle a controversy involving jurisdiction or powers where one of the parties is an administrator or administrative agency of the state. This follows regardless of special statutory procedures under other state laws. *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145; *Kirn* v. *Noyes*, 262 App. Div. (N. Y.) 581, and cases cited; *State ex rel. Public Service Commission* v. *Blair*, 347 Mo. 220, 146 S. W. (2d) 865; *Dunn & Bradstreet* v. *City of New York*, 276 N. Y. 198, 11 N. E. (2d) 728; *Rockland Power & Light Co.* v. *City of New York*, 289 N. Y. 45, 43 N. E. (2d) 803; *Union Pacific R. Co.* v. *Bean*, 167 Ore. 535, 119 P. (2d) 575; *Scott* v. *Alabama State Bridge Corp.*, 233 Ala. 12; *Duncan* v. *A. R. Krull Co.*, 57 Ariz. 472, 114 P. (2d) 888; *Rubel Corp.* v. *Boland*, 117 Misc. 638, 31 N. Y. S. (2d) 572; *Rahoutis* v. *Unemployment Compensation Commission*, 136 P. (2d) 426 (Oregon, 1943).

While the federal courts, construing a federal statute, are in no way controlled by state decisions under state statutes, it will be exceedingly unfortunate if a cleavage in doctrine is permitted to develop. This is particularly true where the state and federal statutes are to all intents and purposes identical. The question becomes increasingly of public importance as administrative agencies strive to extend their jurisdiction rather than to diminish it. Considerations of public policy make it highly expedient that this Court should review this case to see whether it should not be brought into line with the large number of conflicting state decisions.

IV.

The Declaratory Judgment Procedure is Peculiarly Applicable in this Case Which Involves a Conflict Between the Powers of two Administrative Agencies Acting Under Two Federal Statutes.

The purpose of the Federal Trade Commission, as shown by the stipulation, is to regulate the labeling of plaintiff's products. The stipulation mentions advertising in passing but sets forth the labeling in full. No one can advertise warnings forecasting insanity, collapse or the drug habit and the Commission knows this. By the use of overwhelming pressure, and acting by indirection, it seeks to force petitioner to modify its labeling to include these warnings. In so doing, and despite its protestations to the contrary, it is infringing upon the exclusive jurisdiction of the Food and Drug Administration and is acting contrary to its own statute which expressly denies the Commission any power over labeling (Sec. 15 (a), Appendix page 30). Labeling is governed entirely by the Food, Drug and Cosmetic Act. In compliance with that Act, petitioner has included wholly adequate warnings and directions.

It is highly desirable that the excursions of the Commission into territory belonging to another, coequal body should be subject to judicial supervision before the damage is done and not after a long drawn-out, time and money consuming hearing which will result, as the complaint alleges (R. 15) and the motion to dismiss admits. This petition presents a question of more than ordinary importance. It raises the question of the right of one commission to determine its own jurisdiction in relation to that of another commission or, to put it bluntly, the right of the Federal Trade Commission to steal the jurisdiction of the Food and Drug Administration in order to enlarge its own.

V.

The Federal Trade Commission Act Gives The Commission No Jurisdiction to Require this Type of Warnings in Advertising.

The failure of an advertisement to warn the buying public against possible dangers arising out of *excessive* use of the product advertised does not constitute false advertising under Secs. 12 and 15 (a) of the Federal Trade Commission Act. These sections prohibiting and defining false advertisements were passed by the same session of Congress that enacted the Food, Drug and Cosmetic Act. The two acts are in *pari materia* and should be read together as part of a general plan of control of merchandising of food, drugs and cosmetics. The Federal Trade Act is purely negative on this point. It prohibits that which is false and misleading in advertising. The Food and Drug Act affirmatively prescribes how a drug must be identified and labeled to avoid misbranding. (Secs. 201 (n), 502 (d), 502 (f), Appendix pages 22, 23). Finally, the Food and Drug Act declares generally that a drug shall be deemed misbranded—

> "If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof." (Sec. 502 (j), Appendix page 24).

The legislative history is clear that the two acts must be construed together to determine the standards of conduct imposed. All the details of that standard appear in the Food, Drug and Cosmetic Act. Admittedly, nothing in petitioner's advertising is false or misleading. As to consequences which might result from the use of the commodity under the conditions prescribed in the advertisement (Sec. 15 (a), Federal

Trade Commission Act, Appendix page 30), the conditions prescribed are "Full Directions on Package—Read Them", or "Read Full Directions on Bottle". Sec. 15 (a) also speaks of use under customary and usual conditions. The stipulation does not claim that such excessive use as, it says, would produce collapse, insanity or the drug habit is either customary or usual. Common sense would require the contrary conclusion in any event. That was so stated by Congressman Lea, in the debate on the Wheeler-Lea Act of 1938 which gave the Commission jurisdiction over false advertising (Congressional Record, Vol. 83, pages 412, 414).

It affirmatively appears as a matter of law that petitioner is not guilty of false advertising and that it would be to the highest degree unjust to permit the Commission to proceed against petitioner where such action would be outside the scope of the Commission authority. The question is serious enough and of sufficiently wide general application to justify the exercise of this Court's supervisory jurisdiction.

CONCLUSION.

For the reasons stated, the writ should issue as prayed.

Respectfully submitted,

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